Supreme Court, U.S.
FILED

(1) 941107 DEC 22 1994

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Petitioners,

v.

THE CITY OF SALEM and MAYOR AND
COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

JAMES KATZ
Counsel of Record
TOMAR, SIMONOFF, ADOURIAN
& O'BRIEN
41 South Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

860P

QUESTION PRESENTED

Whether the Court of Appeals erred when it established a *per se* rule that invidious discrimination against out-of-state residents seeking access to public employment is absolutely immune from scrutiny under the Privileges and Immunities Clause of Article IV of the United States Constitution, on the grounds that public, unlike private employment, is neither a right nor a privilege protected by the Clause.

PARTIES TO THE PROCEEDING

In addition to the parties listed on the cover, respondents include Leon Johnson, the current Mayor of the City of Salem and current Salem Common Council members John Burke, Robert Davis, Robert Elk, Irene Collier, Robert Johnson, Dennis Bundy, Joseph Weaver, and Earl Gage. The foregoing individuals along with Council members Betsy Erhardt and Donald Sharp, instead of Irene Collier and Joseph Weaver, were listed in the caption before the Court of Appeals, and were members of the Salem Common Council at the time the Complaint was filed. As of January 1, 1995, the Mayor for the City of Salem will be Earl Gage and members of the Salem Common Council will be John Burke, Robert Davis, Robert Elk, Irene Collier, Charles Sullivan, Robert Johnson, Dennis Bundy, and Joseph Weaver.

Petitioners are the Salem Blue Collar Workers Association and Stephen Scull.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. NEITHER THE LANGUAGE, POLICIES, OR PURPOSES OF THE PRIVILEGES AND IMMUNITIES CLAUSE SUPPORT THE LOWER COURT'S ARBITRARY DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT AND ITS CONCLUSION THAT AN OUT-OF-STATE RESIDENT'S DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS IMMUNE FROM SCRUTINY	8
II. THE THIRD CIRCUIT HAS MISTAKENLY RELIED UPON THIS COURT'S DECISION IN *UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL* IN HOLDING THAT DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS NOT SUBJECT TO PRIVILEGES AND IMMUNITIES CLAUSE SCRUTINY	17

TABLE OF CONTENTS—Continued

Page

III. THE LOWER COURT'S DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT FOR PURPOSES OF PRIVILEGES AND IMMUNITIES CLAUSE PROTECTION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION THAT PUBLIC OWNERSHIP OF ASSETS IS INSUFFICIENT JUSTIFICATION FOR DISCRIMINATION UNDER THE CLAUSE 22

IV. RATHER THAN IMMUNIZED FROM REVIEW UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE, A MUNICIPAL RESIDENCY ORDINANCE SHOULD BE SUBJECTED TO SCRUTINY UNDER THE CLAUSE TO DETERMINE WHETHER THERE IS A SUBSTANTIAL REASON FOR ITS DISCRIMINATION AGAINST OUT-OF-STATE RESIDENTS AND A REASONABLE RELATIONSHIP BETWEEN THE MUNICIPALITY'S OBJECTIVES AND ITS DISCRIMINATORY CONDUCT 23

CONCLUSION 25

APPENDIX

Opinion of the Court of Appeals for the Third Circuit (August 25, 1994) 1a

Opinion of the District Court for the District of New Jersey on Cross-Motions for Summary Judgment (September 13, 1993) 26a

Order of the District Court for the District of New Jersey on Cross-Motions for Summary Judgment (September 13, 1993) 51a

Order of the Court of Appeals on Petiiton for Rehearing and Rehearing in Banc (September 28, 1994) 52a

TABLE OF CONTENTS—Continued

Page

An Ordinance Requiring City of Salem Employees To Be Residents Of The City of Salem, In The State of New Jersey, As A Condition Of Employment (Adopted March 20, 1978) 54a

Judgment of the United States Court of Appeals for the Third Circuit (August 25, 1994) 58a

TABLE OF AUTHORITIES

CASES — Page

Austin v. New Hampshire, 420 U.S. 656 (1975) ..8, 9, 10, 14
Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978) 15
Doe v. Bolton, 410 U.S. 179 (1973) 9, 10, 12
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 16
Hicklin v. Orbeck, 437 U.S. 518 (1978) 8, 9, 13, 14, 20, 22
Lutz v. City of York, P.A., 899 F.2d 255 (3d Cir. 1990) 13
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 19
McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 19
Mullaney v. Anderson, 342 U.S. 415 (1952).....9, 14, 15
O'Reily v. Board of Appeals for Montgomery County, Maryland, 942 F.2d 281 (4th Cir. 1991) 12
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).... 12
Shumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992).... 20
Silver v. Garcia, 760 F.2d 33 (1st Cir. 1985)..... 12
Smith v. Allwright, 321 U.S. 649 (1944) 16
Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 9, 15
Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) 9, 12, 15
Toomer v. Witsell, 334 U.S. 385 (1948) 8, 9, 13, 14, 15, 24
United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208 (1984) 9, 12, 14, 16, 17, 19, 20, 21, 24
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) 9, 14, 15
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 207 (1983) 17, 18

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTIONAL PROVISIONS — Page

Article IV, § 2 ..... *passim*

ARTICLES OF CONFEDERATION

Article IV 11

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2201 6
42 U.S.C. § 1983 5
N.J.S.A. 18A:26-1.1 4
N.J.S.A. 34:13A-5.4(a) (1) and (5) 5
N.J.S.A. 40A:14-9.1 4
N.J.S.A. 40A:14-122.1 4

BOOKS, TREATISES, AND MISCELLANEOUS AUTHORITIES

19 *Journals of the Continental Congress* 214-15 (G. Hunt ed. 1912) 11
Developments in the Law-Public Employment, 97 Harv. L. Rev. 1611 (1984) 15
Bancroft, *History of the Formation of the Constitution* (1882) 10
Fiske, *The Critical Period of American History* (1888) 10
W.Z. Hirsch, D. Floyd, *The Substantial Reason Requirement Under the Privileges and Immunities Clause: The Case of Residency Laws*, 15 S.W. Univ. L. Rev. 431 (1985) 11
Nevins, *The American States During and After the Revolution 1775-1789* (1924) 10
Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 Univ. of Pa. L. Rev. 379 (1979) 10, 11, 14
Tribe, *American Constitutional Law*, 535 (2d ed. 1988) 20
Warren, *The Making of the Constitution* (1937) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Petitioners,

v.

THE CITY OF SALEM and MAYOR AND
COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

Salem Blue Collar Workers Association and Stephen Scull respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 25, 1994.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of New Jersey (26a, 56a)[1] is reported at 832 F. Supp. 852 (D.N.J. 1993). The opinion of a divided panel and the judgment of the United States

---

[1] As used herein, "a" refers to the Appendix to this Petition. "J.A." refers to the Joint Appendix filed with the Third Circuit.

Court of Appeals for the Third Circuit (1a, 58a) issued August 25, 1994 and is reported at 33 F.3d 265 (3d Cir. 1994). The order of the Court of Appeals denying the petition for rehearing and rehearing in banc is unreported (52a).

JURISDICTION

The judgment of the Court of Appeals as to which review is sought was entered on August 25, 1994 (1a, 58a). A timely petition for rehearing and rehearing in banc was denied on September 28, 1994 (52a). This petition is being filed within 90 days of September 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The ordinance of the City of Salem whose constitutional review is sought is set forth in its entirety at 54a.

STATEMENT OF THE CASE

Petitioner Salem Blue Collar Workers Association ("Assocation") is a labor organization representing clerical and blue collar workers employed by the City of Salem, New Jersey. The Association is comprised of members who reside in the City of Salem, persons who reside in New Jersey but outside the City of Salem and persons who reside outside the State of New Jersey. In addition, other members of the Association may be willing to reside outside the State of New Jersey but for the City's residency ordinance (J.A. 162-163). Petitioner Stephen Scull was hired by the City as a permanent laborer on November 20, 1989 and could only be terminated for just cause (J.A. 30; 46; 159). Respondent City of Salem is a mu-

nicipal corporation and a public entity in the State of New Jersey. The Mayor and Common Council manage, control and govern the property, finances and affairs of the City (J.A. 30).

The Salem residency ordinance was enacted in 1978 and provides that

> all full-time permanent and full-time, part-time officers and employees . . . employed by the City of Salem are . . . required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein. (54a-55a).

The ordinance has been interpreted by the City to apply only to those hired or appointed after its effective date, thus "grandfathering" individuals previously employed by the City who lived elsewhere. The Mayor and Common Council may waive the ordinance "for good and sufficient cause" where residence outside of the City is required due to the health of the employee, the nature of the employment, or where "specialized talent or technique is required, such as professional services of engineers or accountants." (55a).

The ordinance further requires that as "a condition of employment, each and every employee or prospective employee shall be required to execute an affidavit, in [a] form prescribed by the Mayor and Common Council, setting forth . . . that [the] employee is domiciled in the City" (55a-56a). An employee who is not a resident is to be given "a ten (10) day notice setting forth the charge that the employee is not a bonafide resident" and therefore will be discharged (56a).

Since the ordinance's adoption in 1978, the City of Salem has taken essentially no steps to enforce it. The City has not terminated any employees for failure to comply with it (28a). The ordinance was never discussed or negotiated with the Association. and there is

no reference to it in the parties' collective bargaining agreement (28a) (J.A. 89-90; 163; 165; 167).

The Mayor and Common Council have never promulgated an affidavit for city workers regarding residency nor required any employee or prospective employee to execute such an affidavit, as provided for in the ordinance (28a) (J.A. 78; 90-91; 159-160; 164; 167-168). There is nothing on the City's standard employment application which indicates that all employees are required to be municipal residents. The City provides nothing in writing to any new employee prior to hire that indicates that employment is conditioned upon municipal residency, and no supervisor has ever been instructed to inform employees about the City's residency ordinance (28a) (J.A. 90-91; 105; 109; 167-168).

Although all blue collar and clerical employees are subjected to this residency ordinance, most of the other local governmental employees and municipal supervisory personnel are exempt. The City's police officers, firefighters, and public school teachers are exempted from the ordinance by operation of state law.[2] Additionally, numerous skilled and management personnel have been informally exempted from the ordinance; but none of these employees have sought or received official waivers from the Mayor and/or Common Council (28a).[3]

Neither at the time of its passage or since has the City of Salem obtained any evidence that its residency ordinance has furthered any of its stated goals, resulted in any

---

[2] *See e.g.*, N.J.S.A. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J.S.A. 40A:14-9.1 (firefighters); N.J.S.A. 18A:26-1.1 (teachers).

[3] It is undisputed that the City Treasurer, Engineer, Construction Code Official, Superintendent of Schools, Superintendent of Water and Sewerage Department, Financial Officer, Judge, Municipal Attorney and Prosecutor are not required to live in Salem nor have they ever sought waivers under the residency ordinance.

economic help to the City, or provided any benefits which would not have accrued in the absence of its adoption (J.A. 75-77; 82-85; 102; 108; 130-131). The City admits that it has no facts which demonstrate that persons residing outside of New Jersey are responsible for Salem's economic problems, or that out-of-state residents constitute a peculiar source of the evil at which its residency ordinace is aimed (J.A. 77-78; 83; 85).

When Stephen Scull was hired in 1989, he was a resident of Salem. However, he was not asked to sign an affidavit evidencing that he was a municipal resident, nor was he informed by any City official of Salem's residency requirement. Subsequently, while still employed, Mr. Scull relocated from Salem because of concern for the health and safety of his children (29a).

On January 31, 1992, Kenneth Homan, Superintendent of the Salem Water and Sewerage Department, who is not nor required to be a Salem resident, indicated that because Mr. Scull was residing outside the City, he was in violation of the municipal residency ordinance. Mr. Scull was informed that he had thirty days in which to correct the violation, at which time termination proceedings would commence.[4]

On March 9, 1992, the Salem Blue Collar Workers Association filed an Unfair Practice Charge and an Order to Show Cause with the New Jersey Public Employment Relations Commission, contending that the City of Salem violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1) and (5) by implementing its residency ordinance without bargaining in good faith with the Association. On March 17, 1992, pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment

---

[4] **Although Stephen Scull, a laborer, is required to live in the City or risk losing his job, neither the Supervisor seeking his termination, the City Administrator overseeing the ordinance, or the municipal attorney enforcing the ordinance are Salem residents.**

Act, 28 U.S.C. § 2201, the Association and Stephen Scull filed suit in the United States District Court for the District of New Jersey, alleging that Salem's residency ordinance was violative of the Privileges and Immunities Clause of Article IV, § 2, and that the ordinance's multiple exemptions contravened the Fourteenth Amendment of the United States Constitution.[5] On September 13, 1993, on cross-motions for summary judgment, the District Court granted the City's and denied plaintiffs' motion, dismissing the Complaint in its entirety (26a, 51a).

On appeal, a divided panel of the Court of Appeals for the Third Circuit affirmed (1a). The panel recognized that the decisions from this Court have repeatedly invalidated, on Privileges and Immunities Clause grounds, any prohibition of the right of nonresidents to ply their trades or businesses (6a-7a). However, the majority ruled that public employment is not a "privilege" protected by the Privileges and Immunities Clause and that exclusion of out-of-state residents from access to public as opposed to private employment is therefore immune from scrutiny under the Clause (6a-11a).[6]

In her dissent, Chief Judge Sloviter stressed that the cases from this Court do not establish "an unwavering distinction between public and private employment" (17a) and do not evidence an intention that the scrutiny of the

---

[5] On April 9, 1992, the City of Salem agreed to be temporarily restrained from disciplining Stephen Scull or any other member of the Association for any violation of the residency ordinance until further order of the New Jersey Public Employment Relations Commission. The Commission stayed any action on the Unfair Practice Charge pending the outcome of plaintiffs' constitutional challenge. This stay was lifted subsequent to the decision by the Court of Appeals.

[6] Although admittedly replete with exemptions, loopholes, and a record of non-enforcement, both the trial Court and the Third Circuit held that the City's residency ordinance is not violative of the Fourteenth Amendment (11a-15a; 42a-50a).

Privileges and Immunities Clause is limited only to the denial of access to private employment (18a-23a). Judge Sloviter reiterated that application of the Privileges and Immunities Clause to Salem's residency requirement does not necessarily invalidate the ordinance, but requires a court then to determine whether there is a legitimate justification for the discrimination against non-residents.

> The majority's analysis pretermits that inquiry. The result is that a substantial number of jobs will be permanently foreclosed from out-of-state residents for what may be insubstantial reasons. This is a result that I believe is incompatible under the Privileges and Immunities Clause (23a).[7]

REASONS FOR GRANTING THE WRIT

By establishing a *per se* rule that the protections of the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution are inapplicable to invidious discrimination against out-of-state residents seeking access to public employment, a divided panel of the Court of Appeals (5a-11a), over the dissent of Chief Judge Sloviter (17a-23a), has significantly eroded the guarantees accorded by the Clause. The lower Court's decision creates an arbitrary distinction between public and private rights, concluding that only statutes that burden private but not public employment are subject to scrutiny.

---

[7] Judge Sloviter also noted that the cumulative effect of the various exemptions to Salem's ordinance "throw[s] into question the rationality of the scheme" and she was "troubled by the allegation that the residency requirement lay dormant until applied against appellant Stephen Scull when he questioned the conduct of a volunteer firefighter at the scene of a fire." (24a). Nonetheless, because she believed "that this is an appropriate case for decision of the still undecided question of the applicability of the Privileges and Immunities Clause to public employment," she rested her position that the order of the District Court should be reversed on that ground alone (24a-25a).

This unprecedented ruling has far-reaching consequences. First, denial of access to public employment, one of the largest sectors of the economy, has been arbitrarily eliminated from the purview of the Clause. Second, this decision promotes further expansion of residency requirements and other parochial obstacles which undermine the goals of interstate harmony and economic growth. Finally, the lower Court's rational is particularly destructive because it applies not only to public employment, but immunizes from scrutiny discrimination practiced by governmental entities against out-of-state residents in the direct distribution of any goods and services.

The decision below fatally weakens the protections of the Privileges and Immunities Clause and invites the very type of retaliatory conduct which the Clause was adopted to prevent. Neither the language, policies, or anti-discrimination principles underlying the Privileges and Immunities Clause support the arbitrary distinction created by the divided panel's decision in this case.

I. NEITHER THE LANGUAGE, POLICIES, OR PURPOSES OF THE PRIVILEGES AND IMMUNITIES CLAUSE SUPPORT THE LOWER COURT'S ARBITRARY DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT AND ITS CONCLUSION THAT AN OUT-OF-STATE RESIDENT'S DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS IMMUNE FROM SCRUTINY.

The Privileges and Immunities Clause of Article IV, § 2 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Intended "to help fuse into one Nation a collection of independent sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), the Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin v. Orbeck*, 437 U.S. 518, 523-24 (1978). The provi-

sion "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395.

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin*, 420 U.S. at 662. This Court has relied upon the Privileges and Immunities Clause to invalidate state statutes which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency.[8]

Nonetheless, the Third Circuit concluded that to deny out-of-state residents access to public employment is never

---

[8] *See e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) (Maryland statute requiring only nonresident merchants to obtain licenses to practice their trade, charging nonresidents higher license fees than Maryland merchants, and placing restrictions of the use of merchants from using nonresident salesmen); *Toomer v. Witsell* (South Carolina statute obligating nonresidents to pay one hundred times more for commercial shrimp license than residents); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (statute of Territory of Alaska charging nonresidents forty-five dollars more for commercial fishing licenses than residents); *Doe v. Bolton*, 410 U.S. 179 (1973) (Georgia statute prohibiting abortions performed on out-of-state residents); *Austin v. New Hampshire* (State commuter income tax imposed only on incomes of nonresidents who work in state); *Hicklin v. Orbeck* (Alaskan statute requiring all contracts in connection with the construction of oil and gas pipelines to give preference in hiring state residents); *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208 (1984) (Camden ordinance establishing as a goal that at least 40 percent of the employees on any construction project funded in whole or in part with City funds must be Camden residents); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (New Hampshire's residency requirement for admission to the bar); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia's residency requirement for admission to the bar, without examination, of lawyer admitted to practice in another state).

subject to scrutiny under the Privileges and Immunities Clause. It reached this result without any analysis of the language or purposes animating the Clause.

Unlike other constitutional provisions which are narrowly circumscribed, the Privileges and Immunities Clause contains no such limitation. Rather, its language grants affirmative protection to out-of-state residents against invidious discrimination by specifying that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV, § 2, cl. 1. Nothing therein supports the lower Court's holding that a distinction is to be drawn between access to economic opportunities in the private rather than public sector. *See, e.g., Bolton*, 410 U.S. at 200 (1973) (invalidates restriction on access of out-of-state residents to medical care in both public and private hospitals).

The ruling of the Court of Appeals is inconsistent with the Clause's historical antecedents. Although not extensive, the available evidence of the framers' intent in drafting the Privileges and Immunities Clause indicates it was adopted as an instrument of national unification.[9] Derived from the Fourth Article of the Articles of Confederation, the Clause was designed to help fashion a single nation, by eradicating the discrimination by states against "outlanders" which characterized the period of the Confederation. *Austin*, 420 U.S. at 660-61 (citations omitted).[10]

Despite this historical focus on eliminating discrimination between the states, the Court of Appeals makes the

---

[9] Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 Univ. of Pa. L. Rev. 379, 383 (1979) (hereinafter *"Discrimination"*).

[10] The internecine warfare between the states which led to the Federal Constitutional Convention of 1787 is familiar to every reader of history and needs no detailed description here. *See* Bancroft, *History of the Formation of the Constitution* (1882); Fiske, *The Critical Period of American History* (1888); Nevins, *The American States During and After the Revolution 1775-1789* (1924); Warren, *The Making of the Constitution* (1937).

bold assertion that since the Privilege and Immunities Clause "traces its origin to the language employed in the Fourth Article of the Articles of Confederation [and t]hat Article used terms that were referable to private employment, *e.g.*, 'trade' and 'commerce,' " this evidences that the Clause meant to distinguish between public and private employment (8a). Such a novel theory is seriously flawed.

First, the language of the Clause is not narrowly limited but is an affirmative guarantee to out-of-state residents against invidious discrimination, belying the lower Court's artificial distinction.[11] Second, the fact that the Articles of Confederation explicitly delineated trade and commerce,[12] whereas the Privileges and Immunities Clause provided unrestricted protection to out-of-state residents, evidences that the framers were concerned with eradicating discrimination which undermined the Union, rather than limiting the Clause to selectedly enumerated common callings. Third, under the Third Circuit's "literalist" ap-

---

[11] It is not surprising that the majority cited no original sources in support of this theory. The three law review articles it referenced (8a-9a), are wholly irrelevant to the claim that the Clause was enacted only to protect private rather than public sector employment. On the contrary, a number of recent commentators have argued that the Clause applies equally to discrimination involving public and private sector employment. *See e.g.*, W.Z. Hirsch, D. Floyd, *The Substantial Reason Requirement Under the Privileges and Immunities Clause: The Case of Residency Laws*, 15 S.W. Univ. L. Rev. 431, 445-448 (1986); Simson, *Discrimination*, 128 Univ. of Pa. L. Rev. at 392-395.

[12] The Fourth Article of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free ciitzens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. [19 *Journals of the Continental Congress* 214-15 (G. Hunt ed. 1912)].

proach to constitutional interpretation, the Privileges and Immunities Clause should be equally inapplicable to municipal enactments since they are also omitted from its provisions, but such a narrow approach has been rejected by this Court. *United Building and Construction Trades*, 465 U.S. at 215. Finally, the fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually nonexistent, by no means evidences that the Privileges and Immunities Clause was intended to protect only designated occupations.[13]

This disparity between protections afforded public and private employment is at odds with the purposes animating the Clause. It was designed to minimize friction between the states and encourage interstate harmony. This Court has noted that "no [other] provision in the Constitution has tended so strongly to constitute the citizens of the United States one people." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). As such, the Privileges and Immunities Clause should be equally inapplicable to municipal enactments since they are also omitted from its provisions, but such a narrow approach has been rejected by this Court. *United Building and oCnstruction Trades*, 465 U.S. at 215. Finally, the fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually nonexistent, by no means evidences that the Privileges and Immunities Clause was intended to protect only designated occupations.[13]

The decision below offers no reason why interstate harmony is disrupted any less when the discrimination is

---

[13] Neither the case law nor the Articles of Confederation refer to the practice of law, medicine, driving a taxi cab, or operating as an insurance consultant, but the exclusion of nonresidents from these positions or services is equally violative of the Clause. *See e.g., Friedman*, 487 U.S. at 59 (law); *Bolton*, 410 U.S. at 200 (health services); *O'Reilly v. Board of Appeals for Montgomery County, Maryland*, 942 F.2d 281 (4th Cir. 1991) (taxi driver); *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985) (insurance consultant).

effectuated by a municipality's direct prohibition on employment rather than a city's indirect restraint on employment practices of private parties. This artificial distinction contravenes the antidiscrimination principles which are at the heart of the guarantees accorded by the Clause. Courts have repeatedly recognized that the Clause bars discrimination against out-of-state residents based solely upon their place of residence. *See e.g., Hicklin*, 437 U.S. at 525; *Toomer*, 334 U.S. at 396 ("[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States"); *Paul*, 75 U.S. (8 Wall.) at 180 (The purpose of the Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.").

The Clause is a charter of personal rights, protecting individuals denied opportunities solely because of their place of residence. "[The] Clause embodied not a source of implied fundamental rights, but a federalism—based anti-discrimination principle." *Lutz v. City of York, P.A.*, 899 F.2d 255, 262 (3d Cir. 1990). To the individual excluded as a result of the invidious discrimination sanctioned by the Third Circuit's opinion, the injury is no less real because the deprivation is achieved directly by the City rather than indirectly by restricting the hiring decisions of others.

Rather than promoting interstate harmony, the danger of the Third Circuit's analysis is that it encourges internecine economic conflict. Both courts and commentators have recognized that the heightened protection accorded by the Privileges and Immunities Clause is necessary to protect nonresidents who are completely unrepresented in the decision-making body's legislative process, are political outsiders in the fullest sense, and would otherwise be encouraged to respond by enacting similar exclusionary measures against the offending state or municipality. However, " 'to prevent [retaliation] was one of the chief ends

sought to be accomplished by the adoption of the'" Clause. *See e.g., Austin,* 420 U.S. at 662-63 (1975) (citation omitted); *United Building & Construction Trades,* 465 U.S. at 217; Simson, *Discrimination,* 128 Univ. of Pa. L. Rev. at 384-385 (1979). These principles are no less compelling because an out-of-state resident is deprived of access to public rather than private employment.

The Third Circuit's analysis cavalierly ignores the vital role which the Privileges and Immunities Clause has played in protecting an out-of-state resident's access to employment. This Court decided "long ago . . . that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer,* 334 U.S. at 396. The "pursuit of a common calling" has been repeatedly protected by the Clause and most of this Court's cases "expounding the Privileges and Immunities Clause have dealt with" employment related issues.[14] *United Building & Construction Trades,* 465

---

[14] The courts have repeatedly invalidated efforts to impose restrictions on the employment opportunities of nonresidents. *See e.g., Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871) (statute imposing on nonresident merchants greater licensing fees); *Toomer v. Witsell* (imposing increased fee on nonresidents to obtain commercial shrimp license); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (statute of Territory of Alaska charging nonresidents forty-five dollars more for commercial licensing fees than residents); *Hicklin v. Orbeck,* 437 U.S. 518 (1978) (Alaskan statute requiring all contracts in connection with the construction of the Alaskan oil and gas pipelines to give hiring preference to Alaskan residents); *United Building & Construction Trades* (ordinance which limits 40% of city funded publics works jobs to municipal residents). We have been unable to locate a single case where a court has ever held that an exclusion of an out-of-state resident from employment does not violate the Privileges and Immunities Clause. In the only instance in the past two decades where this Court held that a particular activity (recreational elk hunting) was not a "privilege" protected by the Clause, the Court limited its holding by stressing

U.S. at 219. A person engaged in government service is involved in an activity that must be characterized as the pursuit of a common calling or a livelihood, and obtaining a position with a public entity is just as critical to an individual's economic well being as employment in the private sector.

"Like the occupations considered in the [Supreme Court's] earlier cases, [public employment is] important to the national economy." *Piper,* 470 U.S. at 281. As the dissent noted below, public employment is one of the fastest growing areas of the economy,[15] accounting for nearly one-fifth of all the positions in New Jersey and throughout the country (23a). In terms of its economic importance, it can hardly be doubted that government employment surpasses shrimp fishing, *Toomer v. Witsell,* commercial fishing, *Mullaney v. Anderson,* the trade of foreign goods, *Ward v. Maryland,* and the practice of law, *Supreme Court of Virginia v. Friedman,* occupations considered sufficiently vital to have warranted the Clause's protection.

The Third Circuit offers no reason why discrimination in government employment, one of the largest sectors of the economy, is immune from constitutional scrutiny. Both in numbers and significance, public employees provide many critical services which would otherwise be neglected. The public servant caring for the sick, the indigent, the infirm, and the very young "surely is as important to the maintenance or well being of the Union . . . as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin.*" *Piper,* 470 U.S. at 281-282 (citation omitted).

---

that the activity was "recreation and a sport . . . [and] not a means to the nonresident's livelihood." *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 388 (1978).

[15] *Developments in the Law-Public Employment,* 97 Harv. L. Rev. 1611, 1614-1616 (1984).

The holding below creates the utterly irrational result that although a municipality may not restrict the hiring decisions of private parties contracting with the City, *United Building & Construction Trades,* it may blatantly refuse to hire out-of-state residents. A municipality is prohibited from indirect discrimination, but the lower Court's decision allows public entities to escape review under the Privileges and Immunities Clause by discriminating directly against nonresidents. "Such a formalistic construction would effectively write the clause out of the Constitution." *United Building & Construction Trades,* 465 U.S. at 217 n.9. "Constitutional rights would be of little value if they could be . . . indirectly denied," *Smith v. Allwright,* 321 U.S. 649, 664 (1944), or so "manipulated out of existence." *Gomillion v. Lightfoot,* 364 U.S. 339, 345 (1960).

The import of the Third Circuit's myopic view of the reach of the Privileges and Immunities Clause extends well beyond denial of access to public sector employment. Under its vision, the Privileges and Immunities Clause is equally inapplicable to any discrimination practiced against out-of-state residents in the direct distribution by the government of any goods and services. Such a result will unwittingly promote the proliferation of parochial barriers and further economic conflict between the states, which is inimical to the very principles underlying the Clause.

The Privileges and Immunities Clause was predicated upon a measured view of federalism, seeking to harmonize the goals of national unification, the integrity of individual States, and protection of out-of-state residents against discrimination for no reason other than their State of residence. The Third Circuit's circumscribed reading of the Clause upsets this balance. Neither the language nor logic of the Privileges and Immunities Clause supports the lower Court's conclusion that employment in the private rather

than the public sector is more worthy of constitutional protection.

II. THE THIRD CIRCUIT HAS MISTAKENLY RELIED UPON THIS COURT'S DECISION IN *UNITED BUILDINGS AND CONSTRUCTION TRADES COUNCIL* IN HOLDING THAT DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS NOT SUBJECT TO PRIVILEGES AND IMMUNITIES CLAUSE SCRUTINY.

Although virtually ignoring the principles underlying the Privileges and Immunities Clause and recognizing that this Court has never considered the applicability of the Clause to public employment, the majority infers based on *dicta* found in *United Building and Construction Trades* that this Court intended to establish an unwavering distinction between public and private employment (8a-10a). However, as the dissent explains (17a-22a), rather than providing the basis for a narrow ruling, *United Building & Construction Trades* "expanded the scope of the Privileges and Immunities Clause" (17a). The rigid disparity suggested by the Third Circuit does not follow from this Court's ruling in *United Building & Construction Trades.*

At issue therein was a Camden ordinance which established a goal that at least forty percent of the employees working on any construction project funded in whole or in part with City funds must be Camden residents. Camden contended that because the resident preference applied to positions which were funded by City monies, the impacted employees were, in effect, working for the City and the Privileges and Immunities Clause was therefore inapplicable.

In making this argument, Camden relied upon this Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 207 (1983), in

which a year earlier, this Court upheld an executive order of the Mayor of Boston, which was virtually identical to the Camden ordinance, and required that at least 50% of all jobs on construction projects funded with City funds be filled with *bona fide* Boston residents, was immune from scrutiny under the Commerce Clause, because Boston was acting as a market participant rather than as a market regulator. In *White*, this Court emphasized that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the City.'" *White*, 460 U.S. at 211, n.7. Therefore, the Court emphasized that, "when a State or local government enters the market as a participant, it is not subject to the restraints of the commerce clause." *White*, 460 U.S. at 208.

The holding in *White* turned on whether employees of contractors employed on City contracts could be seen as working for the City. Because this Court so held, Boston was considered a participant in the market for labor, as opposed to a regulator of private parties, and therefore the government's conduct was not subject to the restraints of the Commerce Clause. In *United Building & Construction Trades*, Camden argued that because "for purposes of the Privileges and Immunities everyone affected by the ordinance is also 'working for the City,'" the same analysis should apply, and Camden's conduct should not trigger scrutiny under the Clause. 465 U.S. at 219.

However, this Court rejected that view and held that under the Privileges and Immunities Clause, the distinction between a market participant and market regulator is irrelevant. Although the question of "whether employees . . . on public works projects were or were not, in some sense, working for the City" was critical to the analysis under the Commerce Clause, this Court opined that "the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two clauses have different aims and set different standards for State conduct." *Id.*, 465 U.S. at 220.

United Building and Construction Trades Court stressed that the distinction between public and private employment, which is important for Commerce Clause analysis, is not determinative of what conduct is subject to scrutiny under the Privileges and Immunities Clause. Whereas the Commerce Clause "acts as an implied restraint upon State regulatory powers," 465 U.S. at 220, the "Privileges and Immunities Clause . . . imposes a direct restraint on State action in the interests of interstate harmony." 465 U.S. at 220. Thus, "[i]t is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause, not regulation affecting interstate commerce." 465 U.S. at 220.

United Building & Construction Trades recognized that while the fact that Camden was expending its own funds may be a factor in considering the Privileges and Immunities Clause challenge, "it does not remove the Camden ordinance completely from the purview of the Clause." 465 U.S. at 221. This is because a "determination of whether a privilege is 'fundamental' for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be 'working for the City.' " 465 U.S. at 221. Rather, the Court explained that any prohibition on such employment is subject to the Privileges and Immunities Clause even though the employees are "engaged in projects funded in whole or in part by the City." 465 U.S. at 221-222.[16]

---

[16] The fact that this Court has held that there is no fundamental right to government employment under the Equal Protection Clause, *see e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*), or that a municipal residency ordinance does not violate the right to interstate travel, *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (*per curiam*), does not warrant a finding that the exclusion of out-of-state residents from municipal employment is immune from review under the Privileges and Immunities Clause. The Privileges and

Contrary to the lower Court's assertion (9a-10a), rather than supporting a restrictive view of the Privileges and Immunities Clause, the analysis in *United Building & Construction Trades* evidences an expansive reading of the Clause in three significant ways. First, this Court rejects the claim that the Clause applies only to state enactments. 465 U.S. at 215. Second, the Court finds the distinction between a market participant and market regulator constitutionally irrelevant to Privileges and Immunities Clause adjudication. 465 U.S. at 220-221. Third, although the Court notes (in a phrase that the Court below considers dispositive, 8a) that public employment "is qualitatively different from employment in the private sector" and is a "subspecies" of "common callings," 465 U.S. at 219, it concludes, as Chief Judge Sloviter suggests in her dissent below, "that notwithstanding the inapplicability of other Clauses of the Constitution to a municipal residency requirement, such a requirement trenches on the *raison-d'etre* of the Privileges and Immunities Clause" (22a).

By establishing a *per se* rule that a governmental entity may discriminate against nonresidents seeking positions directly with a public employer, but may not regulate

---

Immunities Clause is not the Equal Protection Clause twice stated in the Constitution. It was designed to outlaw classifications based upon non-citizenship unless the discrimination against nonresidents bears a "substantial relationship to the particular evil they are said to present." *Hicklin*, 437 U.S. at 527. The Third Circuit recently recognized that analyses under the Equal Protection and Privileges and Immunities Clauses may lead to different results, when it held that although "the right to practice law is not a fundamental right for purposes of . . . equal protection analysis . . . it is considered fundamental for purposes of a Privileges and Immunities Clause analysis." *Shumacher v. Nix*, 965 F.2d 1262, 1268, n.9 (3d Cir. 1992). As Professor Tribe noted, if the contours of the Privileges and Immunities Clause were limited to protecting only those rights considered fundamental under the Equal Protection Clause, the guarantees of the Clause would be superfluous. Tribe, *American Constitutional Law* 535 (2d ed. 1988).

the hiring decisions of private parties, the Third Circuit is introducing into Privileges and Immunities Clause jurisprudence the market participant/regulator analysis essential to the Commerce Clause and previously held inapplicable to the Privileges and Immunities Clause. *United Building & Construction Trades*, 465 U.S. at 219-221. The lower court correctly notes (10a) that the Salem ordinance involves the City's direct hiring of public employees while *United Building & Construction Trades* concerned Camden's use of public funds to regulate the employment decisions of private parties contracting with the City. But it was this distinction between a market regulator and participant which this Court rejected in *United Building and Construction Trades*, and which the Third Circuit is now writing into the Privileges and Immunities Clause.[17]

When a municipality enters a market to procure services for its residents, it has two options: it can hire workers directly or, as in the case of *United Building & Construction Trades*, it can expend municipal funds to hire an independent contractor who will hire the employees. In either case, the work is done on city-designated projects, paid for by City funds, and controlled by City regulations. Since the predicate for a violation of the Privileges and Immunities Clause is discrimination against out-of-state residents, it is irrational that discrimination practiced directly

---

[17] As the dissent below correctly observes:

> "Although the court [in *United Building & Construction Trades*] did indeed comment that [t]he opportunity to seek employment with [private contractors and subcontractors engaged in public works] is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city, *id.* at 221-22 (citation omitted), this does not signify that when faced with a direct employment issue, the Court would accept the distinction made by the majority." [22a].

by a municipality is immune from scrutiny, while discrimination practiced indirectly is invalidated.

The vision of the Privileges and Immunities Clause, to restrain State action which destroys interstate harmony, is blinded just as easily by actions a city takes as an employer as it is by a municipality's efforts to control hiring decisions of private parties. The scope which this Court gave to the Privileges and Immunities Clause in *United Building & Construction Trades* militates against adoption of the arbitrary rule which the lower court has suggested in this case.

III. THE LOWER COURT'S DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT FOR PURPOSES OF PRIVILEGES AND IMMUNITIES CLAUSE PROTECTION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION THAT PUBLIC OWNERSHIP OF ASSETS IS INSUFFICIENT JUSTIFICATION FOR DISCRIMINATION UNDER THE CLAUSE.

As the dissent below cogently notes (19a), and as the majority curiously omits, the distinction between public and private employment for purposes of Privileges and Immunities Clause scrutiny is wholly inconsistent with this Court's rejection of public ownership of assets as sufficient justification for discrimination under the Clause. In *Hicklin v. Orbeck*, Alaska sought to rationalize its preference for employing Alaskan residents in projects developing Alaskan oil and gas on the ground that "the oil and gas that are the subject of Alaska hire are *owned* by the State." 437 U.S. at 528. This Court rejected that contention, stating, "[w]e do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause." 437 U.S. at 528.

Consistent with its decision in *Hicklin*, in *United Building & Construction Trades*, this Court rejected the argument that the public ownership of the assets used for

municipal projects immunized the residency requirement from Privileges and Immunities Clause scrutiny, noting that in its earlier cases it had concluded "that the State's interest in controlling those things it claims to own is not absolute." 465 U.S. at 221. The Court continued,

> [m]uch the same analysis, we think is appropriate to a city's efforts to bias private employment decisions in favor of its residents on construction projects funded with public moneys. The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. *But it does not remove the Camden ordinance completely from the purview of the Clause* [465 U.S. at 22] (emphasis added).

For similar reasons, the fact that the City of Salem may be utilizing its funds may be a factor in determining whether its discriminatory hiring decisions violate the Privileges and Immunities Clause. But the arbitrary distinction between public and private employment should not, as the Third Circuit posits, remove Salem's ordinance from the purview of the Clause.

IV. RATHER THAN IMMUNIZED FROM REVIEW UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE, A MUNICIPAL RESIDENCY ORDINANCE SHOULD BE SUBJECTED TO SCRUTINY UNDER THE CLAUSE TO DETERMINE WHETHER THERE IS A SUBSTANTIAL REASON FOR ITS DISCRIMINATION AGAINST OUT-OF-STATE RESIDENTS AND A REASONABLE RELATIONSHIP BETWEEN THE MUNICIPALITY'S OBJECTIVES AND ITS DISCRIMINATORY CONDUCT.

As the majority and dissent recognize in the decision below (11a, n.6; 23a), scrutinizing a residency requirement under the Privileges and Immunities Clause would

not automatically invalidate it. Rather, the City of Salem and any other municipality could still enact such a restriction as long as it demonstrates that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practice against non-residents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *United Building & Construction Trades*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526. "As part of any justification offered for the discriminating law, nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.' " *United Building & Construction Trades*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526. The Clause bars discrimination against nonresidents only "when there is no substantial reason for the discrimination beyond the mere fact that [those excluded] are citizens of other States." *Toomer*, 344 U.S. at 396.

By subjecting denials of employment to the Privileges and Immunities Clause, the out-of-state resident is protected from invidious discrimination while a municipality, if it can demonstrate the rationality of its prohibition, still has the discretion to engage in exclusionary conduct. The Third Circuit's analysis eliminates this inquiry without logic or reason (23a). As a result, a substantial number of jobs are permanently foreclosed from out-of-state residents for what may be irrational grounds. This is utterly incompatible with the promise and protections of the Privileges and Immunities Clause.

CONCLUSION

The Privileges and Immunities Clause was adopted upon a principle that the people of the several states must sink or swim together and that hope is in union and not division. The lower Court's opinion denigrates the guarantees of the Clause by establishing a *per se* rule that invidious discrimination against nonresidents seeking access to public employment is immune from review. Petitioners do not believe that the Privilege and Immunities Clause is so impotent a guarantee that such blatant discrimination should remain wholly beyond its scrutiny.

For all of the foregoing reasons, petitioners respectfully request that the Court grant this petition for certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JAMES KATZ
Counsel of Record
TOMAR, SIMONOFF, ADOURIAN
& O'BRIEN
41 South Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Petitioners